

No. 15,002

IN THE

United States Court of Appeals
For the Ninth Circuit

WONG GONG FAY,

Appellant,

VS.

HERBERT W. BROWNELL, JR., Attorney
General of the United States,

Appellee.

APPELLEE'S REPLY BRIEF.

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FILED

JUN 26 1956

PAUL P. O'BRIEN, CLERK



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APPELLEE'S REPLY BRIEF.

STATEMENT OF THE CASE.

There was a previous appeal by appellant in this case, No. 13,970. The opinion was filed on July 20, 1955 and is to be found at 224 F. 2d 717. The case was tried before the Honorable Michael J. Roche in the United States District Court for the Northern District of California. Judgment was rendered for the defendant, the appellee herein. The appeal from the judgment was heard by this Court subsequent to the decisions in the cases of *Ly Shew v. Dulles*, 219 F. 2d 413, and *Chow Sing v. Brownell*, 217 F. 2d 140. This Court looked to the finding of fact of the trial court that appellant had "failed to introduce evidence of sufficient clarity to satisfy and convince

this court . . .” and found that it was identical (save and except for the name of the appellant) with the findings made in *Ly Shew* and *Chow Sing*, and because of the similarity of the language, this Court was persuaded that the District Court had applied the standard of proof held to be improper in said *Ly Shew* and *Chow Sing* cases, and “on the authority of *Ly Shew* and *Chow Sing*” the judgment is vacated and the cause remanded with directions to make findings as to whether Wong Hai is the father of Wong Gong Fay, such findings to be made in the light of the decisions of this Court, *supra* (*Ly Shew* and *Chow Sing*) and thereupon enter such judgment as may be proper.”

Following the return of the mandate appellant lodged findings of fact and conclusions of law and a document entitled “Amended Judgment of Nationality.” In opposition thereto the findings of fact and conclusions of law and the judgment contained in the transcript of record herein at pages 3 and 6 were lodged by appellee. The findings of fact and conclusions of law as signed by the judge recited the directions of the mandate of this Court and specifically said that “at the conclusion of this case on May 8, 1953 I found that based upon the ordinary burden of proof resting on plaintiffs in civil actions, plaintiff Wong Gong Fay was not entitled to the relief prayed for. I have continuously adhered to that view. The judgment and findings of fact originally entered in this case were based upon the ordinary burden of proof resting on plaintiffs in civil actions.”

QUESTION PRESENTED.

The typewritten transcript on the above appeal does not contain a statement of the points upon which appellant intends to rely on his appeal. Appellant's brief (page 4) claims adherence to the following points:

- (1) The Court erred in reversing the opinion of the Court of Appeals.
- (2) The Court erred in finding that the correct rule of law was applied regardless of the use of language "convincing and satisfying," etc., with respect to evidence.
- (3) The Court erred in making new findings which were contrary to the testimony as evidenced in the record.
- (4) The Court erred in making a new finding that was arbitrary and prejudicial to the rights of appellant.

Although not stated as such, it appears that the only issue raised by appellant is that the judgment of the lower court is "clearly erroneous".

SUMMARY OF ARGUMENT.

Appellant has failed to establish by credible evidence that he is the son of a citizen of the United States and therefore entitled to admission to the United States as a derivative citizen by virtue of Section 1993 of the Revised Statutes.

showing of unreasonable or incredible testimony having been offered by both the father, Wong Hie, and the son, Wong Gong Fay.”

Persons who claimed to be Wong Gong Fay and Wong Hai (Wong Hie, Wong Hu) testified. Wong Hai claimed to have been born in the United States on February 26 or 28, 1901; he claimed to have lived in the United States over 50 years but could not speak enough English to testify without an interpreter. He claimed to have departed the United States for China December 17, 1924, and to have returned on December 15, 1926. He claimed he was married, Chinese Republic 12th year First Month, Tenth Day, which translates to February 2, 1925. His Chinese calendar birthday was KS 27th Year, First Month, Tenth Day.

He claimed a child was born on CR 16th Year, Fourth Month, Eighth Day, United States calendar May 15, 1926. Assuming a child was born as claimed, he would have been not more than six months old when Wong Hai departed China. This child was not seen again in China by Wong Hai. In 1951 a person claiming to be Wong Gong Fay arrived in the United States. There is no evidence to indicate how or on what basis Wong Hie or Wong Gong Fay could have identified each other.

(a) Appellee does not believe Wong Hie was born in the United States. His testimony as to his father, mother, four brothers and sister is most obscure. He had not seen or heard from his mother since 1924.

He had no knowledge of the whereabouts of his brother or sister—in fact has not seen any of them since he returned from China in 1926. His father died in 1914 (Tr. p. 50). His remains were sent to China (Tr. p. 51) by his brother (Tr. p. 51), by his mother (Tr. p. 52), and by a distant relative or cousin (Tr. p. 52).

(b) The school report cards were introduced as Exhibits 2, 3, 4, 5 and 6. Wong Hai claimed that the report cards were sent to him from China. “These were sent to me individually year after year while the boy was attending school.” (Printed Tr. p. 46). On page 75 of the printed transcript he testified:

Q. (By Mr. Collett) When did you come into possession of this document?

A. It has been a long time ago. I cannot remember now.

Q. How long ago?

A. He finished school quite some time ago. I cannot remember exactly what year that was. I do not remember.

Q. Did you have this in 1951?

A. The Interpreter: Forty what?

Mr. Collett: 1951.

A. 1951. That must be about—maybe about that time that he sent me.

Q. Well, do you remember whether or not you had it in 1951?

A. About that time, I can't remember exactly.

Q. How did you receive it?

(Page 76):

A. The Immigration Officer told me to get those report cards in order to present them as

evidence and in the aid to that I wrote home and sent for them.

Q. Oh, you wrote to whom?

A. I wrote home to my wife, told her to find those documents.

Q. Did she send it to you?

A. Yes.

Q. In the letter?

A. Yes.

Q. Do you have the letter?

A. No, the report cards were sent to me without any letter.

Q. Do you have the envelope?

A. I don't know where I placed them now.

Q. Did you ever show this document to the Immigration officials?

A. No, I didn't.

Q. Why not?

A. They didn't ask me.

Q. You stated that they asked you to get it?

A. They asked for it, but I didn't have it. How can I present it when I don't have it?

Q. Why didn't you present it after you got it?

A. I don't know whether I was supposed to submit them. I just turned them over to my attorney.

Q. When?

A. I cannot remember now.

Q. How soon after the Immigration said to you to get the so-called reports did you receive these documents?

A. A few months.

Q. What year was it?

A. 1951.

Q. This Exhibit 3 has the date of August 10, 1944. You did not receive it in 1944, that's correct, isn't it?

(Page 77):

Mr. Fusco: Your Honor, I object to that. Plaintiff has already answered that question and has already stated that——

The Court: What question?

Mr. Fusco: That they were all received after 1951.

Mr. Collett: No, no, he hasn't stated anything like that.

The Court: Proceed.

Q. (By Mr. Collett) Plaintiff's Exhibit 3, do you understand what I mean by Plaintiff's Exhibit 3?

The Court: Show it to him and ask him if he ever saw it before.

Mr. Collett: He has testified, if the Court please——

Q. (By Mr. Collett) You did not receive this document which is entitled Plaintiff's Exhibit 3 in August, 1944?

A. NO.

Q. You said you received it in 1951?

A. Yes.

Q. Referring now to Plaintiff's Exhibit 4, when did you receive this?

A. It was not sent to me individually. It was sent all together at one time in 1951.

(After short recess):

(Page 78):

Q. (By Mr. Collett) It is your testimony that these documents which have been identified as Plaintiff's 3, 4, 5 and 6, these school reports, were all received at the same time, is that correct?

A. Yes.

Q. And you say that that was some time in 1951?

A. About that time. I cannot quite remember now.

Q. At no time were they shown to the officials of Immigration?

A. No.

Q. You told us this morning that you had received them individually year after year while the boy was attending school. That isn't true, is it?

A. Not year after year. They were all sent to me at one time.

Q. Well, you told us this morning that they were received year after year.

A. I didn't say that. I said it was sent to me at one time.

Q. Was that your recollection of your testimony this morning?

A. I think that is what I said this morning, that I think they were sent all together to me.

Q. The truth is, they were not received one at a time individually while the boy was at school, that is not true, is it?

A. I didn't say that those were sent to me individually one by one each year.

Q. Well, it is not true they were received one by one each year?

A. Yes.

Q. Did they all come to you in the same envelope?

A. Yes.

(Page 79):

Q. Are you sure that you received them from China?

A. Yes.

Q. You don't have the envelope in which they were sent to you?

A. I don't have it now.

(c) Plaintiff's Exhibit 7—Income Tax Returns for 1942 and 1943. These income tax returns were produced in support of the claim of dependency. Deductions were claimed in each year 1942 and 1943 but Wong Hai readily admitted he did not send any money and he wasn't able to on account of the war (Printed Tr. 73). He claimed a deduction of \$1155 for dependents in 1943 but stated "I could not send any money home."

(d) Testimony of Wong Gong Fay, or rather the person who claims to be Wong Gong Fay, shows that almost immediately after his release from detention by the Immigration and Naturalization Service he went to Sacramento where he worked, slept, ate, lived, at a laundry operated by the Chin family, continuously thereafter (Printed Tr. pp. 96 to 99).

The record in this case is devoid of any evidence connecting the two persons, the alleged Wong Gong Fay and Wong Hai, as father and son. The absence of association between these two persons following the arrival of Wong Gong Fay in the United States further indicates a complete absence of relationship.

The burden of proof was upon the appellant to establish his claims.

Bauer v. Clark, (CA-7) 161 F. 2d 397;

Mar Gong v. Brownell, (CA-9) 209 F. 2d 448;

Elias v. Dulles, (CA-1) 211 F. 2d 520;

Brownell v. Lee Mon Hong, (CA-9) 217 F. 2d 143;
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Law Don Shew v. Dulles, (CA-9) 217 F. 2d 146;
Fong Wone Jing v. Dulles, (CA-9) 217 F. 2d 138;
Wong Ken Foon v. Brownell, (CA-9) 218 F. 2d 444;
Lew Wah Fook v. Brownell, (CA-9) 218 F. 2d 924;
Lue Chow Kon v. Brownell, (CA-2) 220 F. 2d 187;
United States ex rel. Dong Wing Ott v. Shaughnessy, (CA-2) 220 F. 2d 537;
Lee Dong Sep v. Dulles, (CA-2) 220 F. 2d 264;
Ng Kwock Gee v. Dulles, (CA-9) 221 F. 2d 942.

The credibility of a witness is a matter exclusively for the determination of the trial court.

Chow Sing v. Brownell, (CA-9) 217 F. 2d 140;
Mar Gong v. Brownell, (CA-9) 209 F. 2d 448;
Law Don Shew v. Dulles, (CA-9) 217 F. 2d 146;
Lew Wah Fook v. Brownell, (CA-9) 218 F. 2d 924;
Lee Dong Sep v. Dulles, (CA-2) 220 F. 2d 264;
Lue Chow Kon v. Brownell, (CA-2) 220 F. 2d 187;
Ng Kwock Gee v. Dulles, (CA-9) 221 F. 2d 942;
Wong Ken Foon v. Brownell, (CA-9) 218 F. 2d 444.

The mere say-so of interested witnesses, even though uncontradicted, does not have to be accepted.

Quock Ting v. United States, 140 U.S. 417;

Chin Yow v. United States, 208 U.S. 8;

Marcella v. C.I.R., (CA-8) 222 F. 2d 878, 883;

Purcell v. Waterman SS. Co., (CA-2) 221 F. 2d 953;

Tam Dock Lung v. Dulles, (CA-9) 218 F. 2d 586;

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Lee Sing Far v. United States, 94 F. 834.

CONCLUSION.

The record fully supports the findings of fact and conclusions of law and the judgment of the court below. The judgment is not clearly erroneous and should be affirmed.

Dated, San Francisco, California,
June 15, 1956.

Respectfully submitted,

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